

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KAPOOR v MINISTER FOR HOME AFFAIRS &
ANOR*

[2019] FCCA 2790

Catchwords:

MIGRATION – Partner (Migrant) (Class BC) visa – decision of the Administrative Appeals Tribunal – where applicant claims family violence – where evidence in support did not meet statutory requirements – whether Tribunal overlooked evidence – whether Tribunal misconstrued legislation – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 251, 259A, 361, 476
Migration Regulations 1994 (Cth), regs.1.21, 1.23, 1.24, 1.25, cl.100.221 of sch.2

Cases cited:

AZAEY v Minister for Immigration & Border Protection [2015] FCAFC 193
Bala v Minister for Immigration & Border Protection [2019] FCA 600
Craig v State of South Australia (1995) 184 CLR 163
Minister for Immigration & Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration & Citizenship v Li [2013] HCA 18
Minister for Immigration & Citizenship v SZGUR (2011) 241 CLR 594
Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611
S1845/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 739
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 228 CLR 294
SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCAFC 80

Applicant:

CHINKY KAPOOR

First Respondent:

MINISTER FOR HOME AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

PEG 682 of 2018

Judgment of:

Judge Kendall

Hearing date:	27 September 2019
Date of Last Submission:	27 September 2019
Delivered at:	Perth
Delivered on:	3 October 2019

REPRESENTATION

Applicant: In person

Counsel for the First Respondent: Ms G Ellis

Second Respondent: Submitting appearance, save as to costs

Solicitors for the Respondents: Sparke Helmore Lawyers

ORDERS

(1) The application for judicial review be dismissed.

(2)

(3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 682 of 2018

CHINKY KAPOOR

Applicant

And

MINISTER FOR HOME AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. By application filed in this Court on 21 December 2018, the applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (the “Tribunal”) dated 3 December 2018.
2. The Tribunal affirmed a decision of a delegate of the first respondent (the “Minister”) to not grant the applicant a Partner (Migrant) (Class BC) visa (the “visa”). The Tribunal found that although the applicant and her former partner satisfied the requirements of s.5F(2) of the *Migration Act 1958* (Cth) (the “Act”) prior to separating, the applicant had not produced sufficient evidence to establish family violence. As such, the applicant was not entitled to the visa she was seeking.

3. The applicant now seeks judicial review of the Tribunal's decision. This proceeding is brought pursuant to s.476(1) of the Act. To obtain assistance from this Court, the applicant must show jurisdictional error on the part of the Tribunal.
4. This matter was heard on 27 September 2019. The Court had before it a Court Book ("CB") numbering 224 pages (which was marked as Exhibit 1) and the affidavit of Thomas Morgan Lettenmaier affirmed 26 September 2019. The Court also received written submissions from the Minister filed 9 September 2019.

Factual background

5. The factual background to this matter is accurately summarised at [3]-[8] of the Minister's submissions. The Court adopts that summary as its own. It provides as follows.
6. On 24 December 2014, the applicant applied for the visa (CB 1-23). The applicant was sponsored by Nishant Kapoor (the "sponsor") (CB 24-32). On 23 September 2015, the applicant was granted a temporary partner visa (CB 44-45). On 26 April 2016, the sponsor emailed the Department to withdraw his sponsorship (affidavit of Thomas Morgan Lettenmaier affirmed 26 September 2019, Annexure TML-1).
7. On 12 May 2016, the Department wrote to the applicant advising her that it had received information that the spousal relationship had broken down, and provided her with an opportunity to respond (CB 46-48). On 22 August 2016, the Department wrote to the applicant advising her that before it could consider her claims of family violence, it had to be satisfied that the applicant and sponsor were in a genuine and continuing relationship prior to the cessation of the relationship, and requested information (CB 49-55).
8. On 31 August 2016, the applicant provided a response to the invitation to comment and the request for information (CB 56-62). The applicant stated that she and the sponsor were in a spousal relationship prior to its cessation in April 2016, and that she had suffered family violence.
9. On 20 January 2017, the visa application was refused as the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor prior to the relationship ceasing and, as such, the

applicant did not satisfy the requirements of cl.100.221(4)(b) of the *Migration Regulations 1994* (Cth) (the “Regulations”) (CB 67-70).

10. On 20 January 2017, the applicant lodged an application for review of the delegate’s decision to the Tribunal (CB 83-84). On 30 October 2018, the applicant appeared before the Tribunal to give evidence and present arguments (CB 183-185). She was assisted by her representative at that hearing.
11. On 3 December 2018, the Tribunal affirmed the delegate’s decision (CB 204-212).

Legislative Framework

12. Before considering the Tribunal’s decision, it is useful to outline the legislation relevant to a visa of this sort.
13. It is uncontroversial that in order to be granted the visa the applicant was required to satisfy cl.100.221(4) of sch.2 of the Regulations. This is so because the relationship between the applicant and her sponsor had ceased at the time of the decision.
14. Clause 100.221(4) provides:

(4) *The applicant meets the requirements of this subclause if:*

- (a) *the applicant first entered Australia as the holder of a Subclass 309 (Partner (Provisional)) visa and continues to be the holder of that visa; and*
- (b) *the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and*
- (c) *after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a)— either or both of the following circumstances applies:*
 - (i) *either or both of the following:*
 - (A) *the applicant;*

(B) a member of the family unit of the sponsoring partner or of the applicant or of both of them;

has suffered family violence committed by the sponsoring partner;

...

15. The applicant was seeking to satisfy the Tribunal that she met cl.100.221(4)(c) of the Regulations.
16. A person is taken to have suffered family violence if there is evidence tested before a court, or the visa application includes a “non-judicially determined claim of family violence”. It is then for the relevant decision-maker to be satisfied that there has been family violence or an independent expert has formed the opinion that the alleged victim has suffered family violence during the relationship: Regulations, reg.1.23.
17. The applicant was seeking to establish a non-judicially determined claim of family violence as defined in reg.1.23(9). To do so, the applicant needed to adduce evidence that she had suffered family violence and that the sponsor committed family violence in accordance with reg.1.24.
18. Regulation 1.24 relevantly provides:

1.24 Evidence

The evidence mentioned in paragraph 1.23(9)(c) is:

- (a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and*
 - (b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.*
19. The relevant legislative instrument for the purposes of reg.1.24(b) was IMMI 12/116. IMMI 12/116 relevantly provides:

I, CHRIS BOWEN, Minister for Immigration and Citizenship, acting under paragraph 1.24(b) of the Migration Regulations 1994 (‘the Regulations’):

1. *SPECIFY for the purpose of paragraph 1.24(b) the types of evidence as acceptable evidence at Schedule 1.*
2. *SPECIFY that a minimum of two items of evidence from the list in Schedule 1 and no more than one of each type of evidence may be presented for the purposes of paragraph 1.24(b).*

20. Here, the applicant was required to provide two pieces of as specified in Schedule 1 to IMMI 12/116.

21. Schedule 1 of IMMI 12/116 provides:

Type of Evidence	includes the following detail
Medical report, hospital report, discharge summary or statutory declaration that is made by either a person who is: - registered as a medical practitioner and is performing the duties of a medical practitioner, or - registered as a nurse within the meaning of section 3 of the <i>Health Insurance Act 1973</i> and is performing the duties of a registered nurse.	- Identifies the alleged victim, and - Details the physical injuries or treatment for mental health that is consistent with the claimed family violence.
Either a report, record of assault, witness statement or statutory declaration that is made by: - a police officer of a State or Territory - a police officer of the Australian Federal Police OR A witness statement that is made by someone other than the alleged victim to a police officer during the course of a police investigation.	- Identifies the alleged victim, and - Identifies the alleged perpetrator, and - Details an incident/s of family violence.
Report or statutory declaration made by an officer of: - a child welfare authority, or - a child protection authority of a State or Territory.	- Details fears for the dependent child's safety due to family violence within the household, and - Identifies the alleged perpetrator.
Letter or assessment report made by: - a women's refuge, or - family/domestic violence crisis centre on the organisation's letterhead.	- States that the alleged victim has made a claim of family violence, and - States whether the alleged victim was subject to family violence, and - Identifies the alleged perpetrator, and details any evidence used to form the opinion.
Statutory declaration made by: a member of the Australian Association of Social Workers, or	- States in their opinion the alleged victim was subject to family violence, and - Details the reasons for the opinion, and

• a person who is eligible to be a member of that Association who has provided counselling or assistance to the alleged victim while performing the duties of a social worker.	• Identifies the alleged perpetrator.
Statutory declaration made by a registered psychologist in a State or Territory who has treated the alleged victim while performing the duties of a psychologist.	• States in their opinion the alleged victim was subject to family violence, and • Details the reasons for the opinion, and • Identifies the alleged perpetrator.
Statutory declaration made by a family consultant appointed under the <i>Family Law Act 1975</i> or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website.	• States that the alleged victim has been treated or counselled, by the family consultant or family relationship counsellor, and • States that in their opinion the alleged victim was subject to family violence, and • Details the reasons for the opinion, and • Identifies the alleged perpetrator.
Statutory declaration or a letter on the school's letterhead made by a school counsellor or school principal in their professional capacity.	• States that they have made, or been made aware of, observations that are consistent with the alleged victim's claims that they were subject to family violence, and • Identifies the alleged perpetrator, and • Provides details of those observations.

The Tribunal's Decision

22. The Minister's written submissions at [9]-[16] accurately summarise the Tribunal's decision. The Court adopts that summary as its own. Other than some minor additions as noted below, the Minister's summary provides as follows.
23. The Tribunal found the applicant to be "a candid and credible witness" (CB 206 at [11]) and, on the evidence before it, accepted that the applicant was the "spouse" of her sponsor prior to the relationship ceasing (CB 208 at [24]-[25]).
24. The Tribunal then noted the sponsor's email to the Department on 26 April 2016 withdrawing his sponsorship in which he alleged that the applicant entered into the relationship only for the sake of attaining permanent residency in Australia. The sponsor said:
 - a) he found a Facebook message from the applicant's ex-boyfriend;
 - b) the applicant refused to go to India;
 - c) she said she would make false allegations against him if he failed to get her permanent residency; and

- d) he filed a police complaint against her.
25. The sponsor offered to provide evidence of the above to the Department.
 26. On 4 May 2016, the Department emailed the sponsor and provided an email address to which he could provide further evidence.
 27. The Department received no further evidence from the sponsor (CB 208-209 at [26]).
 28. The Tribunal wrote to the applicant following the hearing and gave her the particulars of the sponsor's email dated 26 April 2016. It explained why the information contained in that email was relevant to the review and explained that one consequence of the Tribunal relying on the information was that it would be the reason, or part of the reason, for the Tribunal affirming the decision under review.
 29. At the hearing before the Tribunal, the applicant agreed that she and the sponsor separated in late April 2016. She refuted the sponsor's allegation that she had entered into the relationship only for the sake of attaining permanent residency in Australia. The applicant agreed that an ex-boyfriend did comment on Facebook about her breakup with him, but denied that any comment was made that the breakup was for the sake of her getting her dream to settle down in Australia. She said she has spoken to that ex-boyfriend since the posting of those comments and he apologised that he was drunk when he made those comments. The applicant said that she had refused to go to India without her husband. She said she was happy to go back to India if her husband went with her but he refused or would follow her later. She did not think he would follow her. The applicant said she did speak to the police at the end of April 2016 because the police rang her to check that she was okay (CB 209 at [27]).
 30. Following the hearing, the applicant was invited to respond in writing to the information provided by the sponsor (CB 209 at [28]). The applicant did so.
 31. The Tribunal found that the applicant's written response was consistent with her evidence at hearing and the sworn statement of Mr Taranjit Singh (CB 209 at [29]).

32. The Tribunal accepted the applicant's oral evidence and her statutory declaration dated 27 November 2018 in relation to the allegations made by the sponsor (CB 209 at [31]). It found that the relationship between the applicant and the sponsor ceased on 26 April 2016, and that the sponsor had withdrawn his sponsorship on that day (CB 209 at [32]).
33. The Tribunal then noted that the issue before it was whether the applicant had suffered family violence committed by the sponsor whilst they were still in a spousal relationship, within the meaning of the relevant Regulations (CB 209 at [33]).
34. The Tribunal then explained that, under reg.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in reg.1.21. The Tribunal attached these Regulations to its decision. The Tribunal noted that the violence, or part of the violence, must have occurred during the relevant relationship: Regulations, reg.1.23(3), (5), (7), (12) and (14).
35. The Tribunal recorded that the applicant was seeking to establish family violence on the basis of a "non-judicially determined claim of family violence" (CB 210 at [35]). It was noted that under reg.1.23, a visa application is taken to include a 'non-judicially determined claim of family violence' where, relevantly, a statutory declaration in accordance with reg.1.24(a) and two pieces of evidence that accord with reg.1.24(b) are provided (CB 210 at [35]).
36. The Tribunal considered the evidence of family violence provided by the applicant and made the following observations and findings:
 - a) in relation to the applicant's statutory declaration dated 22 July 2018, the applicant alleged in that declaration that on 3 February 2016 and in April 2016 the sponsor physically assaulted her and she felt afraid (CB 210 at [41]). The Tribunal was satisfied that the statutory declaration met the requirements of reg.1.25(2) of the Regulations (CB 210 at [42]).

- b) in relation to the report from the registered psychologist Mr CJ Singh dated 7 March 2017:
 - i) in that report, Mr Singh detailed the applicant's history as reported to him (including violence from her spouse), a diagnosis, a treatment plan and a recommendation (CB 210 at [44]);
 - ii) the Tribunal acknowledged that attempts were made to obtain evidence from Mr Singh that met IMMI 12/116 but that he had indicated that he would not give a statutory declaration (although he would consider doing so if requested by the Tribunal) (CB 211 at [45]); and
 - iii) the Tribunal found that the report did not meet the statutory requirements relevant to a report from a registered psychologist because it was not in the form of a statutory declaration and did not include the detail required by IMMI 12/116 (CB 211 at [47]);
- c) in relation to a statutory declaration from Mr CJ Singh (received after the Tribunal hearing and dated 31 October 2018):
 - i) in that statutory declaration, Mr Singh declared that the applicant was referred to him by her GP, that he treated her in his professional capacity as a registered psychologist on 21 February 2017, that a report was issued on 7 March 2017, that the applicant looked on the internet before coming to Perth to find a psychologist who could speak her language, and that the applicant consulted 'us' over the phone a few times in 2016 (CB 211 at [48]); and
 - ii) the Tribunal found that Mr Singh's statutory declaration did not meet the statutory requirements because it did not "state an opinion" that the applicant was the subject of family violence, did not provide "reasons for the opinion" and did not "identify the perpetrator of the family violence" as required by IMMI 12/116 (CB 211 at [49]);
- d) in relation to a medical report and letter from Dr Tuncer Cimenbicer:

- i) the applicant provided a medical report from Dr Cimenbicer confirming that a termination had been performed on 12 April 2016 for “socio economic/medical/mental health reasons”. A letter, dated 23 February 2017, confirmed the applicant’s attendance on 12 April 2016 accompanied by her sponsor (CB 211 at [50]). The applicant submitted that she was forced by the sponsor to have the termination and that these documents demonstrated treatment that was consistent with family violence (CB 211 at [51]);
 - ii) in oral evidence, the applicant claimed she received counselling prior to the procedure, that the counselling was very rushed, and that she told the counsellor that the sponsor did not want the baby. The counsellor then brought the sponsor into the room. The applicant stated that she agreed that if the sponsor was not feeling stable in the relationship, then the termination should proceed and they could plan their family later (CB 211 at [51]); and
 - iii) the Tribunal found that the report and letter from Dr Cimenbicer did not meet the statutory requirements because they did not detail physical injuries or treatment for mental health consistent with the family violence claimed by the applicant (CB 211 at [52]);
- e) in relation to a report, or referral letter, from Dr Chandra Panicker dated 20 February 2017:
- i) in the letter, Dr Panicker stated that the applicant attended his surgery feeling very distressed because of a breakdown in her relationship;
 - ii) the letter did not refer to family violence, or detail physical injuries or treatment for mental health that was consistent with the applicant’s claimed family violence; and
 - iii) on the basis of the above, the Tribunal found that the letter was not evidence of the sort required by IMMI 12/116 and, accordingly, did not meet the statutory requirements (CB 212 at [53]); and

- f) in relation to a letter from NSW Legal Aid dated 12 April 2017:
- i) this letter confirmed that the applicant had received services from the Domestic Violence Unit on 29 April 2016 and that the applicant disclosed that she was a victim of domestic violence. The letter provided no further detail; and
 - ii) the Tribunal found that the letter did not contain the evidence required by IMMI 12/116 and therefore did not meet the statutory requirements (CB 212 at [54]).
37. On the basis of these findings, the Tribunal was not satisfied that the applicant had established a claim under reg.1.24 and, as such, a “non-judicially determined claim of family violence” had not been established under reg.1.23 (CB 212 at [55]).
38. Given that the claim of family violence had not been established, the Tribunal found that applicant did not meet the requirements of cl.100.221(4)(c) for the grant of the visa (CB 212 at [56]).

Proceedings in this Court

39. The applicant’s application for judicial review contains three grounds of review, as follows:
1. *The Tribunal did not consider all the evidence of family violence that was presented and failed to properly consider my claims.*
 2. *The AAT did not give me the chance to provide further evidence of family violence claims.*
 3. *I believe that AAT may have made a legal error in deciding my evidence did not satisfy the requirements of the Regulations and legislative instrument.*
40. The applicant appeared before this Court unrepresented. She was given an opportunity by a Registrar of this Court to file an amended application, any affidavits and a written outline of submissions. The applicant did not file any further materials.
41. It is now standard practice in this Court to give unrepresented applicants an opportunity to explain orally the matters that are said to

give rise to their review grounds and outline broadly any concerns they have with the Tribunal's decision: *Bala v Minister for Immigration & Border Protection* [2019] FCA 600 at [7].

42. To assist the applicant, the Court explained that it could only look at whether the Tribunal fell into jurisdictional error. It was explained that the possible categories of jurisdictional error are not exhaustive and sometimes overlap. For migration decisions of this sort they most commonly include the following categories:
- a) where the decision-maker identifies the wrong issue or asks the wrong question: *Craig v State of South Australia* (1995) 184 CLR 163 (“*Craig*”) at [198];
 - b) where the decision-maker ignores relevant material: *Craig* at [198];
 - c) where the decision-maker relies on irrelevant material: *Craig* at [198];
 - d) where the decision-maker fails to follow mandatory procedures: *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 294 at [207]-[208];
 - e) where the decision-maker shows actual or apprehended bias: see *SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship* [2013] FCAFC 80 at [2]; *AZAEY v Minister for Immigration & Border Protection* [2015] FCAFC 193 at [16]-[17]; and
 - f) where the decision is illogical, irrational or unreasonable: see *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 at [131]; *Minister for Immigration & Citizenship v Li* [2013] HCA 18 at [26]-[28]; *Minister for Immigration & Border Protection v Singh* (2014) 231 FCR 437 at [44].
43. The Court also explained to the applicant that it cannot undertake a merits review of the Tribunal's decision. Specifically, this Court cannot grant the applicant the visa she seeks. Rather, the Court can only undertake an analysis of whether the Tribunal engaged in jurisdictional error in making the decision it made.

44. Against that background the Court asked the applicant to make submissions on what she thought the Tribunal “did wrong”. Unfortunately, the applicant’s oral submissions did not assist her. They generally took issue with the Tribunal’s conclusions and sought an impermissible merits review.
45. The applicant also sought to tender documents that she said proved that her former spouse had treated her poorly.
46. The Court wants to make it very clear that it does not doubt the sincerity of the applicant’s statements before this Court. Hers is a most unfortunate, indeed unsettling, case. Unfortunately, the Court cannot reference the documents provided as they had not been provided to the Tribunal. They were not in evidence before the Tribunal and were directed to the merits of her claim to have suffered family violence (and the obvious hardship and emotion that has resulted) which the Court cannot consider.
47. Further, for the reasons that follow, while the Court has no reason to doubt the applicant’s sincerity, the Court is unable to find jurisdictional error in the Tribunal’s reasons.

Consideration

Ground 1

The Tribunal did not consider all the evidence of family violence that was presented and failed to properly consider my claims

48. The Court notes the Minister’s submissions at [21]-[22] as follows:
 21. *The Tribunal clearly listed all of the additional evidence that the applicant provided to the Tribunal prior to the hearing (CB 205-206, [9(a)-(t)]), and following the hearing (CB 206, [10]). The Tribunal then considered the evidence relevant to establishing a “non-judicially determined claim of family violence” against the appropriate Regulations and Instrument.*
 22. *There was no evidence of family violence that the Tribunal failed to consider, let alone any evidence that was critical to the process of decision-making such that jurisdictional error could be said to arise (per CNN15 v Minister for*

49. The first part of this ground of review suggests that the Tribunal overlooked particular evidence. The second part of the ground of review seems to allege that the Tribunal failed to actively and properly engage with the applicant's claims of family violence.
50. In relation to the alleged failure to consider evidence, the applicant has failed to identify what evidence and claims the Tribunal overlooked. This leaves the Court to assess on the materials before it whether any evidence or material was overlooked.
51. The Court is not satisfied that the Tribunal has overlooked any evidence. The Tribunal confirmed that it had before it the documents provided to the delegate. The Tribunal then itemised the documents that had been provided to it for the purposes of the review (CB 205-206 at [9]-[10]).
52. The Tribunal also referred to the oral evidence the applicant gave at the Tribunal hearing.
53. In the absence of the applicant identifying what evidence was overlooked, the Court is satisfied that the Tribunal has not overlooked any evidence that was presented to it.
54. Turning to the second part of this ground, and whether the Tribunal properly (that is actively and intellectually) considered the applicant's claim of family violence and the evidence provided in support, the Court is similarly satisfied that the Tribunal made no errors in this regard.
55. The Tribunal here correctly identified the applicant's claims at [12]. Specifically, the applicant claimed that she was the spouse of the sponsor, the relationship with the sponsor had ceased, and she had been the victim of family violence.
56. The Tribunal properly considered whether the applicant was the spouse of the sponsor and whether the relationship had ended at [15]-[33]. The Tribunal accepted the applicant's claims in this regard.

57. The Tribunal then turned to the applicant's claim to meet cl.100.211(4). At [43]-[54], the Tribunal carefully (indeed, forensically) considered whether the evidence that the applicant had provided to support the claim that she met cl.100.211(4) met the statutory requirements prescribed in reg.1.24.
58. The Tribunal engaged with the substance of the evidence for the purpose of determining whether it met the requirements of IMMI 12/116, and consequently reg.1.24(b). While the Tribunal may not have determined whether family violence had actually occurred, it did not need to. The Tribunal was required to determine whether the evidence presented met the requirements of reg.1.24 such that a "non-judicially determined claim of family violence" had been made under reg.1.23.
59. The Tribunal determined that the evidence provided did not meet the strict statutory requirements relevant to the matter before it. In effect, the two pieces of evidence required had not been provided. This issue is addressed in more detail when considering ground 3.
60. For the purposes of ground 2, however, the Court finds that the Tribunal has not failed to consider any evidence and has properly (actively and intellectually) engaged with the applicant's claims.
61. Ground 1, accordingly, is dismissed.

Ground 2

The AAT did not give me the chance to provide further evidence of family violence claims.

62. The Court has inferred that the reference to "further evidence" suggests that the applicant is claiming that she was not provided a chance after the Tribunal hearing to present evidence pertaining to family violence.
63. To the extent that this is what the applicant is claiming (and, regrettably, it was very unclear), the Court notes that on 1 November 2018 (the day after the hearing) the applicant's representative forwarded a statutory declaration from Mr Singh to the Tribunal which, arguably, was meant to address the family violence evidentiary requirements (CB 186-187).

64. On the face of the Tribunal's decision, there does not appear to have been a request for further time to provide evidence after the conclusion of the Tribunal hearing and there is nothing to suggest that the applicant intimated that more evidence would be forthcoming.
65. If the applicant is suggesting she was not provided an opportunity to present further evidence to the Tribunal generally, this cannot be accepted. Not only did the applicant provide a large number of materials to the Tribunal (see [9]), the applicant also appeared before the Tribunal to give evidence and provided materials after the hearing, including submissions in response to information that was put to her under s.359A of the Act after the hearing.
66. The applicant was also represented before the Tribunal by a highly regarded migration firm. Were it the case that more evidence was forthcoming, it seems highly unlikely that her representatives would not have requested an opportunity to provide it.
67. On the evidence, the Court is satisfied that the applicant had ample opportunity to present the evidence she wished the Tribunal to take into account.
68. Ground 2, accordingly, is dismissed.

Ground 3

I believe that AAT may have made a legal error in deciding my evidence did not satisfy the requirements of the Regulations and legislative instrument.

69. On one view, the applicant is simply disagreeing with the Tribunal's assessment of the evidence and the findings it made. In effect, the applicant seeks an impermissible merits review of the Tribunal's decision.
70. On another view, the applicant is contending that the Tribunal "misunderstood the law" in determining that the various pieces of evidence that she provided did not meet reg.1.24(b).
71. The Court does not agree that the Tribunal misunderstood the law in this regard.

72. The applicant submitted 5 documents as “Evidence of Family Violence” (CB 107). The Tribunal examined each of those documents in detail and then assessed whether they met the requirements of reg.1.24.
73. If the documents did not meet reg.1.24, then there could not be a non-judicially determined claim of family violence: Regulations, reg.1.23(9).
74. The documents that the Tribunal determined did not meet the requirements of reg.1.24(b) were:
- a) a report dated 7 March 2017 from CJ Singh (not in statutory form), who was a registered psychologist;
 - b) a statutory declaration signed by CJ Singh, registered psychologist, on 31 October 2018 and received by the Tribunal the day after the hearing;
 - c) a medical report from a Dr Cimenbicer and a letter dated 23 February 2017;
 - d) a referral letter dated 20 February 2017 from a Dr Panicker; and
 - e) a letter from New South Wales Legal Aid dated 12 April 2017.
75. The reasons the Tribunal gave for finding that the evidence did not meet reg.1.24(b) of the Regulations do not indicate to the Court that the Tribunal misapplied or misunderstood the law.
76. The Court has reviewed IMMI 12/116 and the Tribunal’s reasons for finding that each piece of evidence given to it was not a “type” of evidence as defined in IMMI 12/116.
77. The reasons the Tribunal gave were entirely open to it. Specifically:
- a) the report dated 7 March 2017 from CJ Singh, who was a registered psychologist, was not in the form of a statutory declaration (which is required by IMMI 12/116), something which the applicant’s representatives recognised given they advised Mr Singh that in order for the Tribunal to afford weight to his evidence, it must be in the form of a statutory declaration;

- b) the statutory declaration signed by CJ Singh (and provided after the hearing) did not contain any of the details that are required by IMMI12/116 – such as a statement that it was Mr Singh’s opinion that the applicant was subject to family violence;
- c) the “medical report” at CB 58 and the letter dated 23 February 2017 from Dr Cimenbicer did not “detail the physical injuries or treatment for mental health that is consistent with the claimed family violence”. Rather, they indicated that a termination had been performed for unspecified reasons;
- d) the referral letter of Dr Panicker, which the Tribunal appeared to accept was a medical report, also did not refer to family violence. Rather, it only referred to the applicant feeling “distressed” because of a “breakdown in her relationship with her husband”; and
- e) the letter from Legal Aid only stated that the applicant had claimed she was the subject of the domestic violence. It did not, as per IMMI 12/116, state whether the applicant was subjected to family violence or who the alleged perpetrator was and how Legal Aid came to the conclusions it came to (if it did, in fact, make conclusions which it did not).

78. IMMI 12/116 required the applicant to provide *two* pieces of evidence. She did not provide any evidence that satisfied the requirements of IMMI 12/116. Rather, the evidence was vague or lacking in detail. The applicant thus failed to meet the requirements of reg.1.24(b).

79. Having failed to satisfy reg.1.24(b), the applicant could not consequently meet cl.100.211(4)(c) (which was a mandatory criterion for the visa). In the circumstances, the Tribunal had no choice but to affirm the decision under review and refuse the visa.

80. Ground 3, accordingly, is also dismissed.

Otherwise

81. The Court acknowledges that in circumstances where the applicant is unrepresented, the Court should review the materials for itself to identify whether any potential error arises.

82. Here, the Court's attention was drawn to what appeared to be a submission from the applicant's representative asking the Tribunal to obtain further information from Mr Singh. It could be said that this was a request made pursuant to s.361 of the Act.

83. In this submission to the Tribunal, the applicant's agent wrote:

Provided with this submission is a medical report from CJ Singh, a registered psychologist who has treated Mrs Kapoor while performing the duties of a psychologist in February 2017. Mr Singh requires a formal request from the Tribunal for a statutory declaration before one can be provided (see email attached).

84. The "email attached" related to correspondence between the applicant's representative and Mr Singh which indicated that he would be unable to provide a statutory declaration unless he had obtained approval from relevant bodies (his insurer and the regulatory board).

85. At [45]-[46], the Tribunal stated as follows:

45. The Tribunal acknowledges the attempts of the representative to obtain evidence from CJ Singh that complies with the evidence requirements in IMMI 12/116. Email correspondence between CJ Singh and the applicant's representative indicates that he would not give any report in the form of a statutory declaration but would consider doing so at the Tribunal's request if approval was obtained from his supervisor, the Australian Psychological Society Advisory Service, and his public liability insurance.

46. The Tribunal is under no duty to obtain information on behalf of the applicant. It is for the applicant to put her evidence before the Tribunal and for the Tribunal to decide whether her claim has been made out. ...

86. The Tribunal correctly acknowledged that it was under no obligation to make any formal request: Act, s.361(3); *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594 at [20]. All that the Tribunal was obliged by s.361(3) to do was consider making the request. It clearly did so at [45]-[46].

87. What remains to be considered is whether it was unreasonable for the Tribunal to have declined to make a formal request or inquiry.

88. The Court is satisfied the Tribunal did not err by not requesting a statutory declaration from Mr Singh.
89. It is noted that a statutory declaration was eventually provided to the Tribunal one day after the hearing. Unfortunately, it lacked substance of the sort required by IMMI 12/116. Further, the correspondence from the applicant's representative did not state that if a request was made by the Tribunal that a statutory declaration *would* be forthcoming. Rather, it says only that Mr Singh could "make no promises" and that to do so he would require the approval of his supervisor, the regulatory board and his insurer. There is no indication that the statutory declaration would be timely or indeed "easily ascertained".
90. In the particular circumstances of this case, while most unfortunate, the Court is satisfied there was no error in the Tribunal choosing not to request that Mr Singh provide a statutory declaration. While this Court might have done otherwise, that is not the test relevant to proceedings of this sort. Rather, the Court can only determine whether the Tribunal's decision evidences jurisdictional error. It does not do so here.

Conclusion

91. The grounds in the applicant's application for judicial review have failed to disclose any jurisdictional error. The Court has also been unable to identify any jurisdictional error on the face of the Tribunal's decision generally.
92. Unfortunately, and most regrettably, the applicant's application for judicial review must be dismissed.
93. The Court observes that in *S1845/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 739, the Federal Court noted that the circumstances in that case warranted a comment that it might be appropriate for the Minister to consider permitting the applicants to remain as per the exercise of the discretion available to the Minister under s.351 of the Act.
94. This Court is of the view that this case is also a case for which the Minister might want to consider exercising the discretion provided in s.351 of the Act. Such an observation is in no way legally binding on

the Minister, who has the ultimate discretion. However, the Court draws the applicant's attention to the possibility of assistance from the Minister via s.351 of the Act.

I certify that the preceding ninety-four (94) paragraphs are a true copy of the reasons for judgment of Judge Kendall

Associate:

Date: 3 October 2019